

**MISSOURI COURT OF APPEALS
WESTERN DISTRICT**

**MARTHA S. SUTHERLAND, AS TRUSTEE OF THE MARTHA S. SUTHERLAND
REVOCABLE TRUST DATED AUGUST 18, 1976,
APPELLANT
vs.**

**MARK SUTHERLAND, AN INDIVIDUAL; STEVEN PEARSON, AN INDIVIDUAL;
PERRY SUTHERLAND, AN INDIVIDUAL; AND STEVEN SCOTT, AN INDIVIDUAL,
AND SUTHERLAND LUMBER COMPANY OF KANSAS CITY, LLC.,
RESPONDENTS**

DOCKET NUMBER WD72493

DATE: SEPTEMBER 13, 2011

Appeal from:

The Circuit Court of Jackson County, Missouri
The Honorable Jay A. Daugherty, Judge

Appellate Judges:

Division Three: Joseph M. Ellis, P.J., Victor C. Howard and Thomas H. Newton, JJ.

Attorneys:

Stewart Kusper, for Appellant

Phillip Bledsoe, for Respondents

MISSOURI APPELLATE COURT OPINION SUMMARY

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v.

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WD72493

Jackson County, Missouri

Before Division Three Judges: Joseph M. Ellis, P.J., Victor C. Howard and Thomas H. Newton, JJ.

Appellant Martha Sutherland, as Trustee for the Martha Sutherland Revocable Trust, appeals from a judgment entered in the Circuit Court of Jackson County in favor of the defendants in a derivative action filed by Appellant against Mark Sutherland, Steven Pearson, Perry Sutherland, and Steven Scott and, nominally, against Sutherland Lumber Company of Kansas City LLC ("SLKC").

AFFIRMED.

Division Three holds:

- (1) The instructions submitted by the trial court to the jury accurately stated the business judgment rule, and Appellant failed to demonstrate any prejudice resulting from the failure to give an additional instruction on the burden shift that may occur in an equitable action to recover profits.
- (2) Appellant failed to preserve any claim that the trial court erred in rejecting her proposed instruction R by failing to include any such claim in her point relied on. Moreover, that instruction misstated the law in that not every transaction between two companies in which a fiduciary has an interest establishes, as a matter of law, that the fiduciary has put the fiduciary's interests before that of either company; the presumption that arises is rebuttable. The trial court committed no error, plain or otherwise, in rejecting the proposed instruction.
- (3) Contrary to Appellant's assertions, the Missouri legislature clearly intended to incorporate the common law related to ratification in Chapter 347.
- (4) The ratification instruction, requiring that the members have been "informed of the material facts," was sufficient because if members have been

"informed of the material facts, they clearly have "full knowledge" of them, and "the material facts" necessarily include "all the material facts" because the omission of any material fact would bema that the members were not informed of "the material facts."

(5) The trial court did not err in submitting the instruction on the reliance on the advice of counsel defense where the instruction substantially reflected all of the elements set forth in § 347.090 and a requirement of full disclosure of the material facts to counsel is implicit in both § 347.090 and the instruction submitted. The instruction required the jury to find that the defendants "reasonably relied upon" the opinions and statements of counsel on matters the defendants reasonably believed were within counsel's professional expertise and competence. If the jury found that a defendant withheld any material facts from counsel, reliance upon the opinion would not be reasonable, and the jury would find accordingly.

(6) Sufficient evidence to support a defense of reasonable reliance on the advice of counsel was submitted at trial. Various defendant's testified that they met with counsel, they explained the situation, they asked for legal advice, counsel advised them that they could demand a confidentiality agreement before providing Appellant with access to the company books and records, and counsel responded on behalf of the company.

(7) Appellant failed to properly preserve its claim that SLKC should not have been allowed to participate at trial where its motion in limine was granted in part and Appellant made no further objection to SLKC's participation at trial. Even were the issue preserved for appeal, the trial court did not abuse its discretion in allowing SLKC to participate in a defined, limited manner to defend its internal management process.

Opinion by Joseph M. Ellis, Judge

Date: September 13, 2011

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